

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

IVAN DAVID LOPEZ,

Defendant and Appellant.

D074075

(Super. Ct. No. SCN382953)

ORDER MODIFYING OPINION
AND DENYING REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on February 7, 2019, be modified as follows:

1. On page 7, the paragraph under the heading DISPOSITION is deleted and replaced with the following paragraph.

The matter is remanded with directions that the trial court (1) prepare a corrected probation order that reflects the statutory basis for the base fine and penalty assessments imposed on Lopez and (2) clarify its intent regarding the unrecited terms of the protective order. The judgment is otherwise affirmed.

The petition for rehearing is denied.

There is no change in judgment.

McCONNELL, P. J.

Copies to: All parties

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(Super. Ct. No. SCN382953)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Affirmed in part, and reversed in part.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Kristen Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

Ivan David Lopez pled guilty to assault with a deadly weapon (Pen. Code § 245, subd. (a)(1)).¹ At sentencing, Lopez was granted probation on various terms and conditions, including being subject to a criminal protective order. On appeal, Lopez makes three contentions: (1) the court failed to state any statutory basis for the base fine and penalty assessment imposed at sentencing, (2) the protective order includes conditions that were not imposed by the court, and (3) the order granting probation fails to reflect the court's stay of payment of probation costs.²

As we explain, we agree the matter should be remanded to allow the trial court to state the factual basis for the base fine and penalty assessment and to clarify the conditions of the protective order imposed on Lopez, including those not recited at the sentencing. In all other respects the judgment is affirmed.

¹ Subsequent statutory references are to the Penal Code.

² In his notice of appeal, Lopez challenged the validity of the plea, alleging self-defense and implying that, at the time of plea, he was not aware of the implications it carried, namely the felony conviction and his possible deportation. The record indicates otherwise, and Lopez did not brief either issue. Therefore, this claim of error is forfeited on appeal. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1372, fn. 12 [declining to address issues not properly raised in appellant's opening brief].)

FACTUAL AND PROCEDURAL BACKGROUND³

Lopez was arrested following an altercation with the victim at Lopez's estranged wife's residence. After entering the residence, Lopez hit and punched the victim in the face and head several times, then followed him outside where the fight continued. Lopez grabbed a screwdriver from his car and swung it at the victim, injuring him. The following day, Lopez was arrested, and the San Diego District Attorney filed an information charging him with assault with a deadly weapon (§ 245, subd. (a)(1)) and personal use of a dangerous and deadly weapon in the commission of the offense (§ 1192.7, subd. (c)(23)). Lopez pled guilty to both the offense and enhancement and agreed to a term of 180 days in custody.

At sentencing, the trial court suspended the sentence for three years and placed Lopez on formal felony probation. Lopez's probation order contains an \$820 fine, which consists of the offense base fine, penalty assessment, and surcharge. As a condition of probation, the court issued the protective order, which was served on Lopez that day.⁴ At the hearing the court stated, "pursuant to Penal Code Section 1203 you'll be served with an order. You're not to have personal, electronic, telephonic or written contact, contact

³ Because Lopez pled guilty to the offense, these facts are primarily taken from the probation report.

⁴ The sentencing hearing transcript indicates that the protective order was not available at sentencing and would be provided to Lopez later that day. However, the protective order signed by the court and filed the day of the hearing includes a checked box indicating Lopez was in fact served with the protective order, which service he does not challenge on appeal.

through a third party, nor come within 100 yards of [the victim]. And you'll be served with that before you leave today."

The protective order is on form CR-160 (Rev. Jan. 1, 2017), which permits the court to check boxes to identify additional probation conditions. In addition to the conditions that were check-marked *and* recited by the court at sentencing, the court also marked two additional conditions that it did not recite at the hearing: "The protected persons may record any prohibited communications made by the restrained person" (No. 17 on the form) and "Other orders including stay-away orders from specific locations: home, employment, school, vehicle" (No. 18 on the form).

DISCUSSION

I

Statutory Basis for Fines Imposed

The "failure to specify the amount and statutory basis for each fine, fee, and penalty assessment is a 'legal error[] at sentencing' that can be reviewed on appeal ' "regardless of whether an objection or argument was raised." ' " (*People v. Hartley* (2016) 248 Cal.App.4th 620, 637, quoting *People v. Smith* (2001) 24 Cal.4th 849, 852.)

There are "two different aspects of the sentencing process: (1) the oral pronouncement of judgment by the sentencing judge, and (2) the preparation of the abstract of judgment by the court clerk." (*People v. Hamed* (2013) 221 Cal.App.4th 928, 938.) During sentencing, the trial court must "recite the amount and statutory basis for any base fine" (*id.* at p. 939), and also either recite the statutory basis for any penalty or refer to an itemization of penalty assessments contained in a probation report. (*Id.* at

pp. 939–940.) This requirement helps the parties and the court identify and correct errors in fines and penalty assessments at the trial court level and avoid unnecessary appeals. (*Ibid.*) The court clerk must also list the statutory basis for each base fine and penalty assessment in the abstract of judgment. (*Id.* at p. 940.)

Lopez challenges the \$820 fine the court imposed for his violation of section 245, subdivision (a)(1), as set forth in paragraph 2, subdivision (a) of the order granting felony probation. A worksheet accompanying the probation recommendation specifies the breakdown of the \$820 fine as: "2a Offense Base Fine + Penalty Assessment + PC 1465.7 (a) Surcharge [\$]820." Below this notation, under the heading "Fine Calculations for 'INCLUDING Penalty Assessment' Fines," it provides: "2a CH1 - Base Fine [\$]200 [¶]; PA5 - Penalty Assessment [\$]580 [¶]; and] SUR - State Sur Charge [\$]40," for a total fine of \$820. Although the "Offense Base Fine" ostensibly refers to the charge listed on the first page of that order, the penalty assessment still lacks a statutory basis. Further, the worksheet with the breakdowns is not attached to the Order Granting Formal Probation.

Lopez alleges, and the People agree, that the trial court was required to state a statutory basis for the imposition of any fines, fees, or penalties to be imposed. We accept the People's concession and remand to clarify the statutory basis for the imposition of the \$820 fine.

II

Additional Conditions in Protective Order Not Recited at Sentencing

"In a criminal case, it is the oral pronouncement of sentence that constitutes the judgment." (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324, italics omitted.) "As

with other clerical errors, discrepancies between an abstract and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal." (*Ibid.*, citing *People v. Mitchell* (2001) 26 Cal.4th 181, 188.)

Detailed recital of probation terms in court may not be necessary if the conditions are "spelled out in detail" on the probation order, and the defendant knows what they are. (*People v. Thrash* (1978) 80 Cal.App.3d 898, 901–902.) "[I]f the clerk's and reporter's transcripts cannot be reconciled, the part of the record that will prevail is the one that should be given greater credence in the circumstances of the case." (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346, citing *People v. Smith* (1983) 33 Cal.3d 596, 599.)

The People argue that the discrepancy between the trial court's recitation of the terms of the protective order and the actual terms as indicated on that order represent a "distinction without a difference."⁵ Because Lopez was issued a protective order at his arraignment hearing that included terms nearly identical to those that he now contests, it is *possible* that the court intended to include the same terms in the protective order at issue. However, because the record does not establish that Lopez received the form protective

⁵ The People cite *People v. Zackery* (2007) 147 Cal.App.4th 380, 386 (*Zackery*) in contending that Lopez is bound by every term in the protective order, asserting that the "appellate court has authority to correct errors that do not accurately reflect what occurred." While this argument is accurate in terms of the appellate court's authority, *Zackery* in fact corrected clerical errors in the clerk's minutes to reflect what occurred during the oral proceedings. *If* applied here, *Zackery* could support striking the additional terms of the protective order that were not recited at Lopez's sentencing. (See *Id.* at p. 385.)

order at the sentencing hearing, and the court did not recite the terms challenged by Lopez, the trial court's intent regarding these terms was unclear.

Out of an abundance of caution, on remand the trial court is directed to clarify its intent regarding the terms of the protective order imposed on Lopez.

III

Modification of Probation Order on Remand

Lopez asserts, and the People concede, that the order granting probation fails to reflect the trial court's stay of the payment of probation costs. Accordingly, the parties ask this court to modify the order to reflect the stay. Both Lopez and the People, however, cite to the probation department's recommendation report rather than the final Order Granting Formal Probation signed by the trial court, which unambiguously states that probation costs are "stayed pending successful completion of probation."

The People's concession on this issue is not binding on this court. (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021 [although Attorney General's concession entitled to "appropriate deference," appellate court is not bound by it].) Because the Order Granting Formal Probation accurately reflects what the court orally pronounced at the sentencing hearing, no modification of that order is warranted.

DISPOSITION

The matter is remanded with directions that the trial court (1) prepare a corrected probation order that reflects the statutory basis for the base fine and penalty assessments imposed on Lopez and (2) clarify its intent regarding the unrecited terms of the protective order. Following such consideration, the court shall prepare an amended abstract of

judgment and forward a certified copy of the same to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.